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Stock Building Supply and Local 221, a/w International Brotherhood Of Teamsters, AFL-CIO, Petitioner. Case 18-RC-16871

April 3, 2002

ORDER REMANDING

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

The National Labor Relations Board¹ has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (relevant portions of which are attached as an appendix). The Employer's request for review is granted as it raises substantial issues warranting review.

We remand this case to the Regional Director and direct that he considers further the Employer's contention that the Petitioner's earlier petition in Case 18-RC-16856 should have been dismissed with 6 months prejudice.² If prejudice had attached to the earlier petition, the petition in Case 18-RC-16871 would not be processed.

In its earlier petition, the Petitioner sought to represent certain of the Employer's employees. However, the Regional Director determined that the unit sought was too narrow, and he directed an election in a broader and substantially different unit. Initially, the Petitioner indicated that it wished to proceed with the election in the broader unit. However, before receiving the eligibility list of voters, the Petitioner changed its mind and requested withdrawal of its petition.

As noted, the Regional Director granted the request without prejudice. Now, in this case (filed within 6 months of the earlier withdrawal), the Petitioner seeks to represent a different unit of the Employer's employees.

Section 11113 of the Board's Casehandling Manual (Part Two) Representation Proceedings reads as follows:

A withdrawal request should generally be approved *without prejudice* if [a] petitioner seeks to withdraw after the Regional Director or the Board has directed an election in a unit substantially different from that sought by the petitioner. Secs. 11312.1(c) and (d). However, if a union indicates that it wishes to proceed to an election in the different unit and, after submitting a sufficient additional showing of interest (Sec. 11031), is provided the eligibility list of voters (Sec. 11312.1(d)), a subsequent withdrawal request should be approved only with prejudice. Sec. 11118.

¹ The Board has delegated its authority in this proceeding to a three-member panel.

² The Regional Director approved the Petitioner's withdrawal request, without prejudice, on September 25, 2001.

The second sentence of the above sets forth three conditions. As to the first, at the time of the withdrawal request in 18-RC-16856, the Petitioner had indicated that it wished to proceed in the unit found appropriate by the Regional Director. As to the second condition, the Regional Director assumed *arguendo* that there was an adequate showing of interest in that unit. However, as to the third, there was not a furnishing of the *Excelsior* list.

If all three conditions had been met, the withdrawal request should have been with prejudice. The Regional Director concluded that, since condition number three was absent, the withdrawal request *must* be without prejudice. This interpretation was in error. If one or more of the three conditions is missing, the Regional Director is to exercise his discretion, albeit "generally" he should approve the request without prejudice.

Our dissenting colleague submits that the Regional Director in fact exercised his discretion in this case. We disagree. The Regional Director, in applying Section 11113, stated as follows:

If, and only if, a union is provided such a list, should withdrawal be with prejudice. [Emphasis added.] It is clear in this case—and the Employer does not otherwise contend—that Petitioner was not provided the eligibility list in [the prior case] before it withdrew the petition. Therefore, I deny the Employer's request that the petition in this matter (18-RC-16871) be dismissed.

Surely, the Regional Director did not purport to be exercising discretion. Rather, he clearly held that withdrawal with prejudice should occur **if and only if** all three conditions, including the providing of an eligibility list, have been met. Literally, he expressed his view that the *only* way that withdrawal is to be with prejudice is if all conditions are met. Phrased differently, the Regional Director said that the nonfulfillment of a condition means that the withdrawal *must* be without prejudice. Thus, the Regional Director did not exercise discretion.

Our dissenting colleague says that the Regional Director's decision was "consistent with" Section 11113 of the manual. That may well be the case. Further, an exercise of discretion that is "consistent with" the manual may well be proper. However, as stated, our point is that the Regional Director did *not* exercise his discretion.

Accordingly, we remand this case to the Regional Director for him to exercise the appropriate discretion.³
Dated, Washington, D.C. April 3, 2002

Peter J. Hurtgen,	Chairman
Michael J. Bartlett,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

I would deny review. Contrary to my colleagues, I find that the Regional Director's approval of the withdrawal of the petition in Case 18-RC-16856 without prejudice and his denial of the Employer's motion to dismiss the instant petition were a proper exercise of his discretion.

The Petitioner filed a petition for an election in Case 18-RC-16856, seeking to represent certain of the Employer's employees. The Regional Director issued a Decision and Direction of Election, finding appropriate a unit broader than that sought by the Petitioner and giving the Petitioner 14 days to submit an adequate showing of interest in the broader unit. The Petitioner thereafter submitted a request to withdraw its petition in Case 18-RC-16856, which was approved by the Regional Director without prejudice to the filing of a new petition within a 6-month timeframe. Within that 6 months, the Petitioner filed the petition in this case seeking a unit different than that found appropriate by the Regional Director in Case 18-RC-16856, and the Regional Director directed an election in the petitioned-for unit.

The Employer argues that the petition in Case 18-RC-16856 should have been dismissed with prejudice, which would have required the dismissal of the instant petition because it was filed within the 6-month timeframe. The Regional Director, relying on Section 11113 of the NLRB's Casehandling Manual (Part Two) Representation Proceedings,¹ found that the prior petition was properly dismissed without prejudice. The Regional Director stated that "a request to withdraw should be approved without prejudice until such time as a union is provided the eligibility list of voters. If, and only if, a union is provided such a list, should withdrawal be with preju-

dice." Because the Petitioner had not yet been provided with an *Excelsior* list at the time it sought to withdraw its petition, the Regional Director denied the Employer's request to dismiss the instant petition. In its Request for Review, the Employer reiterates its contention that the Regional Director erred in permitting the Petitioner to withdraw its prior petition without prejudice.

I find, contrary to my colleagues, that the Regional Director's approval of the withdrawal of the prior petition without prejudice constituted a proper exercise of his discretion. My colleagues claim that the Regional Director failed to exercise any discretion in dismissing the petition without prejudice, by effectively concluding that the withdrawal of the petition *must* be without prejudice because an *Excelsior* list was not provided to the Petitioner prior to the withdrawal request. I disagree with this reading of the Regional Director's decision.

As explained in his decision, the Regional Director's approval of the Petitioner's withdrawal request without prejudice is consistent with Section 11113 of the Casehandling Manual (Part Two) Representation Proceedings, which begins by stating the general policy that such withdrawal requests "should generally be approved without prejudice." Further, since the Petitioner did not receive an *Excelsior* list prior to its withdrawal request, the Regional Director's approval of the request without prejudice is also consistent with that section's stated exceptions to this general policy.

I construe the language used by the Regional Director in his decision as an exercise of his discretion under the Casehandling Manual. I do not read him to be saying, as my colleagues suggest, that a dismissal without prejudice was compelled.

Accordingly, I perceive no basis for a remand, and I would deny the Employer's request for review.

Dated, Washington, D.C. April 3, 2002

Wilma B. Liebman,	Member
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NATIONAL LABOR RELATIONS BOARD

APPENDIX

5. Petitioner seeks a unit limited to all full-time and regular part-time store truckdrivers, yard workers, load builders, laborers, material receiving personnel, mechanics, millworkers, and store forklift operators employed by the Employer at its Cedar, Minnesota facility; excluding office clerical employees, plant assemblers, field assemblers (installers), field and plant leads, designers, plant truckdrivers, sales personnel, managers, guards and supervisors as defined in the Act. Contrary to Petitioner, the Employer contends that its plant assemblers, leads and truckdrivers, and its field assemblers and field leads share a community of interest with the classifications sought to be included by Petitioner and must, therefore, be included in the

³ It is not for the Board to exercise the discretion. The Regional Director must do so, subject to limited Board review.

¹ Sec. 11113 of the NLRB's Casehandling Manual states:

A withdrawal request should generally be approved without prejudice if [a] petitioner seeks to withdraw after the Regional Director or the Board has directed an election in a unit substantially different from that sought by the petitioner. Secs. 11312.1(c) and (d). However, if a union indicates that it wishes to proceed to an election in the different unit and, after submitting a sufficient additional showing of interest (Sec. 11031), is provided the eligibility list of voters (Sec. 11312.1(d)), a subsequent withdrawal request should be approved only with prejudice. Sec. 11118.

unit. In addition, the Employer maintains that the petition should be dismissed.

This petition was filed as a result of an earlier proceeding involving Petitioner and the Employer in Case 18–RC–16856. In Case 18–RC–16856, Petitioner sought to represent the Employer’s employees employed at its plant and store facilities located at the Employer’s Cedar, Minnesota facility, excluding the Employer’s field installation employees. On September 18, 2001, I issued a Decision and Direction of Election in Case 18–RC–16856, wherein I concluded that Petitioner failed to establish that a unit limited to plant and store employees, excluding field installation employees, was appropriate. In the September 18 decision, I noted:

Thus, the proposed unit does not conform to any administrative function or grouping of the Employer’s operations; there is neither employee interchange nor functional integration between the two groups that is distinguishable from that among all three groups; and the employees in the two groups sought do not share common supervision or working conditions to establish the appropriateness of the petitioned-for unit. (Citation omitted.) Whether each of the three groups of employees might be appropriate units is not before me because Petitioner did not seek separate units as an alternative to its petitioned-for unit, and, therefore, the Employer had no opportunity to address this issue.

A copy of the Decision and Direction of Election in Case 18–RC–16856 is attached hereto.²

Consistent with Board policy, I declined to dismiss the petition in Case 18–RC–16856 because, at the hearing, Petitioner indicated a desire to participate in an election in the broader unit. However, I also indicated that Petitioner could withdraw its petition without prejudice if it did not wish to proceed to an election in the broader unit by notifying me within 14 days of the issuance of the decision. This policy is set forth in the Na-

tional Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Section 11113. Subsequently, on September 24, 2001, Petitioner withdrew its petition, and I approved the withdrawal without prejudice by letter dated September 25, 2001. At the time Petitioner withdrew its petition in Case 18–RC–16856, it filed the petition in this case, seeking to represent a smaller group of employees.

On October 1, 2001, the Employer filed a Request for Review of Regional Director’s Decision Approving Withdrawal of Petition Without Prejudice and Motion to Dismiss New Petition. In its request, the Employer complains that because Petitioner initially indicated an interest in proceeding to an election in the broader unit, and because the parties agreed on the dates and time of the election in Case 18–RC–16856, therefore I was precluded from approving Petitioner’s withdrawal of its petition without prejudice. In support of its argument, the Employer cites the Board’s Casehandling Manual (Part II) Representation Proceedings, Section 11112.1(a), that withdrawal of petitions after hearings are closed shall be with 6 months’ prejudice. The Employer’s argument that Section 11112.1(a) applies ignores, of course, the fact that I ordered an election in a substantially different unit, and therefore Section 11113 applies.

The Employer also argues, however, that even if Section 11113 applies, that because Petitioner made the required showing of interest (I accept this premise here for purposes of argument only) and initially stated it wished to proceed to an election, the exception set forth in Section 11113 no longer applies and withdrawal should be with 6 months’ prejudice. The Employer cites no cases in support of its argument. Unlike the Employer, I read Section 11113 to mean what it says—that a request to withdraw should be approved without prejudice until such time as a union is provided the eligibility list of voters. If, and only if, a union is provided such a list, should withdrawal be with prejudice. It is clear in this case—and the Employer does not otherwise contend—that Petitioner was not provided the eligibility list in Case 18–RC–16856 before it withdrew the petition. Therefore, I deny the Employer’s request that the petition in this matter (18–RC–16871) be dismissed.

² The Decision in Case 18–RC–16856 incorrectly identifies Petitioner as Teamsters Local 121. Petitioner in both Case 18–RC–16856 and in this matter is Local 221.